IN THE SUPREME COURT OF FLORIDA



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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. 93, 037 |
| | ) | |
| ROBERT HARBAUGH, | ) | District Court of Appeal, |
| | ) | 4th District - No. 97-0298 |
| Respondent. | ) | |

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# RESPONDENT'S BRIEF ON THE MERITS

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On Review from the District Court
of Appeal of Florida, Fourth District

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## INTRODUCTION

Respondent, ROBERT G. HARBAUGH, files his Brief on the Merits. Throughout this brief, Petitioner, The State of Florida, will be referred to as the "state" or "prosecution" and Respondent will be referred to as "defendant." The symbol "R" will be used to designate the pleadings filed as of record. The symbol "T" will be used to designate the transcript of testimony of the suppression hearing of July 19, 1996 and the trial held on December 11 and 12, 1996. The symbol "ST" will be used to designate the transcript of testimony of the sentencing hearing of January 17, 1997. The symbol "App" will be used to designate the appendix. All emphasis has been added unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

Defendant was charged by information dated January 26, 1996 with Felony Driving Under the Influence alleging that on January 6, 1996 defendant had committed the offense of driving under the influence (DUI) and had been previously convicted of DUI in New Jersey on April 6, 1974, October 3, 1977 and April 12, 1980. (R 1-2) Defendant entered a plea of not guilty and demanded a trial by jury. (R 5-6) On January 18, 1996 (R 7-10) and on April 2, 1996 (R 13-16) defense counsel filed a demand for discovery, requesting, inter alia, "Certified copies of all prior New Jersey convictions of the defendant." (R 15) On May 7, 1996, after writing two letters to the state attorney requesting certified copies of the New Jersey convictions relied upon to treat the case as a felony, defendant filed a motion to compel discovery of the New Jersey certified convictions. (R 29-33) After taking the depositions of Deputies Casserly and Taylor, defendant on May 31, 1996 filed a motion to suppress and/or dismiss and alleged therein that the initial stop of the defendant's vehicle took place at a police roadblock for which there were none of the required operational written guidelines and, therefore, the stop violated defendant's Fourth Amendment right to be free from unreasonable searches and seizures. (R 34-48) The state filed a memorandum of law in opposition to the defendant's motion to suppress/dismiss. (R 49-52)

### Suppression Hearing Testimony

A hearing on the motion to suppress/dismiss was held on July

19, 1996 at which the following testimony was adduced:

Deputy Casserly of the Broward Sheriff's Office testified that he reported to work on the evening of January 5, 1996 at the Pompano substation (T 4,5, 12). At that time he received a radio communication to go down to a Ft Lauderdale location because a police officer had been shot. (T 12) He responded to the location (T 5, 12) and upon arrival, he spoke to a Ft. Lauderdale police sergeant (whose name he could not recall) (T 12) who briefly (a couple of seconds) and orally instructed him to go to Southeast 16th Court and US1 (Federal Highway) and to maintain that position. (T 5, 13) He was told not to allow any people to enter the crime scene (T 18) and to look for the possible suspect, a white male, late twenties, unshaven, approximately 5'10", medium build and shoulder length hair. (T 6,13-14) The suspect was further indicated to be on foot. (T 27) Deputy Casserly took up his position at around 11:00 P.M. (T 26) and blocked the street with his vehicle by parking it perpendicular (in a northerly direction) to oncoming traffic on 16th Court. (T 8,14, 23) On 16th Court there is a streetlight that stands back about 75 or 80 yards on the south side of the street. (T 16) The boundaries of the perimeter ran on the south from 17th Street and US1 east to the intracoastal (T 18), then ran north from 17th Street and US1 to Davie Blvd. (T 19) and then east again from Davie Blvd to the intracoastal. (T 19) Vehicles, like the defendant's, proceeding in a westerly direction down 16th Court to where the Deputy was located were inside the perimeter; nevertheless he was given no instructions by the Fort

Lauderdale police sergeant about dealing with people who were inside the perimeter as opposed to keeping people from coming into the perimeter. (T 20) In addition, although Deputy Casserly had been on perimeter roadblocks previous to this one, he had never read any directives from the Broward Sheriff's Office regarding actions to be taken at perimeter roadblocks. (T 21-22)

Just after midnight, he observed the defendant's vehicle traveling west on 16th court approaching the intersection with US1 (T 8, 23) He signaled defendant who didn't stop right away, but did stop upon seeing the deputy. (T 9, 25, 26) He did not observe the defendant violate any Florida traffic laws from the time he first observed the vehicle until the time the vehicle stopped. (T 23) He walked up to the defendant's window to tell him to turn around at which time he noticed defendant's speech was slurred and he detected an odor of an alcoholic beverage coming from his mouth. (T 10) He asked the defendant for his driver's license and after some fumbling the defendant produced it. (T 11). He then called Deputy Taylor from the DUI task force to respond to conduct a DUI investigation. (T 11) Deputy Taylor handled the investigation and he continued the "roadblock." (T 12)

Deputy Casserly remained at the intersection until 6:30 or 6:35 A.M. at which time the perimeter was broken down as far as marked vehicles. (T 26-27) During this time, he received no further instructions on what to do. (T 27)

Deputy Taylor testified that he is a member of the DUI task force of the Broward Sheriff's Office and earlier on the night in

question he had been assigned to the police perimeter as a result of the shooting of Fort Lauderdale police officer, Penney. (T 32) He received a call from Deputy Casserly regarding a DUI investigation and responded to the location. (T 33) After speaking with Deputy Casserly, he made contact with the defendant. (T 33) After administering some roadside sobriety exercises which the defendant agreed to take, Deputy Taylor arrested defendant for DUI and read him the Florida Implied Consent Law. (T 34-33, 37) Upon agreeing to take a breath test, defendant was transported to the breath alcohol testing facility. (T 35) He started the test, but did not finish. (T 35) Defendant did not request any other type test and Deputy Taylor did not ask him whether he wanted a breath test. (T 35) Deputy Taylor made three more DUI arrests after he arrested the defendant. (T 37) Subsequent to the hearing, the trial court by order dated July 23, 1996 entered an order denying the motion to suppress. (R 54-56) In the order, the trial judge agreed that if the police had established a roadblock where the defendant was stopped such roadblock did not have the requisite guidelines; however, relying upon Scott v. State, 629 So. 2d 238 (Fla. 3rd DCA 1993), the trial court determined that there was no roadblock, rather it was a crime scene police perimeter. (R 55)

Thereafter the defendant filed a motion to reconsider the motion to suppress the roadblock stop along with the Supreme court of Florida's recently released case of Campbell v. State, 21 Fla. L. Weekly (Opinion filed September 19, 1996) (R 63-67) and a motion in limine to exclude any testimony regarding the HGN test

administered to defendant by Deputy Taylor at roadside and to exclude any reference to the word test when referring to the other roadside exercises defendant performed in accordance with this court's ruling in State v. Meador, 674 So. 2d 826 (Fla. 4th DCA 1996). (R 68-77) The motion in limine was granted. (R 83) The motion to reconsider the roadblock stop was denied. (T 96)

**Trial Testimony**

At the trial the state called as its first witness, Deputy Taylor who testified he was a member of the DUI task of the Broward Sheriff's office (T 274) and that on the night in question he was on the crime perimeter and had been released when he was called by Deputy Casserly to assist him at the 1600 block of South Federal Highway. (T 279-280) Defendant was sitting in his car when Deputy Taylor arrived (T 280) and after speaking to Deputy Casserly he made contact with the defendant at which time he noticed a strong odor of an alcoholic beverage coming from his mouth (T 282), his eyes were bloodshot, his speech was slurred, his face was flushed and he was unsteady on his feet. (T 289) In response to Deputy Taylor's questions, the defendant said he was coming from the Mezzaluna restaurant and he had four or five glasses of wine to drink. (T 291) Defendant agreed to perform some roadside sobriety exercises and at that juncture Deputy Taylor turned on the video camera. (T 291) Deputy Taylor related the tests he administered and described the defendant's performance (T 292-298) after which he placed the defendant under arrest for being under the influence of alcoholic beverages. (T 298-299) After reading defendant the

Implied Consent Law, defendant agreed to take a breath test and was transported to the breath alcohol testing facility. (T 300-301) The videotape was moved into evidence. (T 302) After a twenty minute observation period, CSA Porio administered the breath test to defendant. (T 305) He didn't blow properly and he refused to continue. (T 305) Subsequently, he was transported to jail. (T 306) The videotape was then played for the jury with the exception of that portion regarding the administration of the HGN test. (T 317-326)

The state called as its next witness CSA Suzanne Porio who is employed as a breath alcohol testing technician by the Broward Sheriff's Office. (T 389) After asking whether he was willing to submit to a breath test and the defendant agreed, she observed him for twenty (20) minutes and demonstrated to him how to blow into the Intoxilyzer. (T 396) The first time he blew into the machine he was not making a tight seal around his lips and the air was coming out the side. (T 397) She took the mouthpiece from him and demonstrated again. (T 397) Air was again coming out the side of his mouth and the machine registered a deficient sample. (T 398) After this second attempt, the defendant told CSA Porio he did not want to blow again. (T 399) She further testified that at no time did he ever tell her he had any illness or injury which would make him unable to blow into the machine. (T 402)

The last witness the state called was Deputy Casserly whose testimony mirrored his testimony at the suppression hearing. (T 416) He testified that when he stopped the defendant and smelled

alcohol, he asked the defendant for his driver's license and he first produced a voter's registration card. (T 445) He returned the card and told him he needed a driver's license; defendant then produced a driver's license from his wallet. (T 445) When he was stopped, he wasn't violating any traffic laws. (T 446, 448) At the conclusion of Deputy Casserly's testimony, the state rested. (T 451) Defendant moved for a directed verdict (T 455) which was denied. (T 456)

Defendant then took the stand in his own behalf. (T 464) He testified that he became asthmatic over in England and as a result was discharged from the U.S. Air Force. (T 468) He still is asthmatic and is subject to attacks in the cold night air. (T 468) He always carries a Bronc-Aid Mist for relief. (T 469) On the night in question he met with three other persons at the Mezzaluna restaurant at 7:30 P.M. (T 472, 474) During the course of the evening he had four or five glasses of wine and left the restaurant about 11:30 P.M. (T 475) Upon leaving the restaurant, he went out the back entrance of the parking lot onto 16th Court. (T 478) He drove slowly down 16th court until he came to the roadblock. (T 479) At first he did not see any police officer, but he stopped the minute the officer got his attention. (T 479) When the officer approached his vehicle, defendant lowered his window at which time the officer asked for his license and registration. (T 481, 482) He further testified that he has no wallet and always keeps his license in his money clip. (T 482) He also testified that he does not have a voter's registration card and Officer Casserly was

mistaken. (T 483) It was cold that night and he used his Bronc-Aid Mist after he came out of the restaurant. (T 484) As ordered by Deputy Casserly he got back into his vehicle and remained there until Deputy Taylor arrived. (T 486) At the conclusion of defendant's testimony, the defense rested. (T 507) Defendant's motion for directed verdict at the close of the evidence was denied. (T 507)

After the jurors retired to deliberate they requested to view the videotape. (T 549) When the jury was brought back into the courtroom, one juror asked if the jurors could ask that the video be stopped, so they could talk among themselves about a particular point and then restarted. (T 551) The jury was sent out. (T 551) The judge, after discussing the suggested procedure to be utilized and after some concern was expressed by defense counsel, explained to the jury the procedure to be employed. (551-554) The TV, VCR and tape were going to be sent back into the jury room. The assistant state attorney and defense counsel would also go back into the jury room and the assistant state attorney would play the video. (T 555-556) The jurors were further instructed:

> While that is taking place, there are only two things that you can say to the lawyers. One, if you have a desire to see a part again, would you please rewind it, play it again. That's okay. Or, if you want to discuss some aspect of what it is you have seen, you will simply ask the lawyers to excuse you, they will remove themselves from the jury room.
>
> So that you are aware of it, they will be taking the tape with them when they exit. And when you are finished and wish to see further portions of the tape, you will simply ring the buzzer, indicate that you are ready for them

> to come back, they will come back and we'll continue with that process.
>
> What I cannot permit you to do, and this has to be very clear, is as its being played, you can't make a comment with regard to anything that you are seeing in their presence, you can't ask them a question. If there is any type of a question that needs to be addressed, it has to be in the same procedure that we have employed before. You need to write it down and it needs to be addressed to me. (T 555-556)

The lawyers did not object. (T 557) Following the playback of the video in the jury room, defense counsel in response to the court's question stated he did not perceive any problems. (T 558).

The jury returned a verdict of guilty on the misdemeanor DUI. (T 560) The judge discharged the jury and denied defense counsel's request to have the jury listen to evidence regarding the existence of the three prior New Jersey DUI convictions. (T 512, 565) Based upon the understanding that the state had a certified copy of defendant's driving record from the Florida Department of Highway Safety and Motor Vehicles (T 565), the trial court adjudicated defendant guilty of felony DUI. (R 89, 568) Defense counsel voiced his objection. (T 567-68, 569-70) Defense counsel's request that defendant's bail be continued until the January 17, 1997 sentencing was denied. (T 570) The trial court revoked defendant's bail and defendant was taken into custody. (T 569)

On December 18, 1996 defense counsel filed a motion to dismiss information or directed verdict of not guilty on the grounds that (a) the state had failed to prove the existence of the three prior New Jersey convictions and (b) defendant was deprived of his right to have a jury determine this element of the offense. (R 90-92) On

the day of the sentencing hearing, January 17, 1997, defense counsel also filed a motion to strike state's reliance on three New Jersey DUI convictions and raised as grounds that these convictions were uncounseled and the dates of the respective convictions were not the same dates as alleged in the information, which prejudiced defendant in the preparation of his defense. (R 147-149) Those motions were denied. (ST 37 & 38)

At the sentencing hearing, over the objection of defense counsel (ST 3- 18, 19-20, 21, 22), the state was permitted to introduce into evidence certified copies of defendant's driving records (ST 19, 21) and the three New Jersey judgments (ST 21, 22, 23) bearing the respective conviction dates of February 2, 1975, February 14, 1978 and May 12, 1981. (ST 24) The state then rested (ST 23) Defense counsel then raised further objections on the grounds of lack of identity, uncounseled convictions, and the variance between the dates in the information and the dates of the New Jersey judgments. (ST 23-25) After hearing argument of defense counsel, the court concluded that the state established the three prior New Jersey convictions beyond a reasonable doubt. (ST 47) The court then sentenced defendant to four years probation with a special condition of 364 days in jail. His license was permanently revoked and he was ordered to participate in the advanced CASAP, pay a $5,000.00 fine and court costs, perform 300 hours of community service per year and attend the Scared Sober Program. (ST 50-51) Defendant in open court filed his notice of appeal. (ST 53)

On appeal, defendant raised three issues. (App "B") The

first issue challenged the lawfulness of the initial stop of the defendant. (App "B") The second issue challenged the procedure of permitting the prosecutor and defense counsel in the absence of the trial judge to be in the presence of the jury in the jury room. (App "B") The third issue challenged on several grounds the sufficiency of the evidence presented by the state to prove the prior DUI convictions and the denial of the defendant's request to have the jury decide the element of the prior convictions. (App "B") The state filed its Answer Brief (App "C") and the respondent filed his Reply Brief. (App "D") After hearing oral argument, the Fourth District Court of appeal issued its opinion, affirming point I and reversing for a new trial on Point II. Becasue of the revrsal on Point II the District Court declined to address the issues in point III with the exception of the certified question raised by respondent of whether the jury should decide the element of prior convictions in light of the holding in United States v. Gaudin, 515 U.S.506 (1995). (App "A") Although respondent is the aggrieved party, the state filed the Notice To Invoke Discretionary Jurisdiction invoking the discretionary jurisdiction of this honorable court on the basis of the certified question. (App "E")

## SUMMARY OF ARGUMENT

I.

In a felony DUI case, the existence of three or more prior convictions is an element of the crime. State v. Woodruff, 676 So. 2d 975, 976 (Fla. 1996) The United States Supreme Court in United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) held that in a criminal case, pursuant to the Fifth and Sixth Amendments to the United States Constitution a jury must decide whether a defendant is guilty beyond a reasonable doubt of each and every element of the crime charged. In light of this holding, this honorable court should amend the bifurcated procedure set out in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) to require upon the request of the defendant that the jury decide the element of the existence of the prior convictions upon finding defendant guilty of the pending DUI.

II.

Having failed to follow the appellate rules regarding a request for certification and having invoked the discretionary jurisdiction of this court solely on the basis of the certified question in Point I, the state has waived or is precluded from arguing the completely unrelated issue raised in Point II.
Moreover, this honorable court has held it is per se reversible error to permit in the absence of the trial judge the prosecutor and defense counsel to be alone in the jury room with the jury without an express waiver of the defendant. Bryant v. State, 656 So. 2d 426 (Fla. 1995); Brown v. State, 538 So. 2d 833 (Fla. 1989).

This error is not subject to harmless error analysis because of the potential chilling effect on the jury's deliberations. Brown, Id., at 836 ("The possibility of prejudice is so great in this situation that it cannot be tolerated.")

## ARGUMENT

### I.

WHERE A DEFENDANT REQUESTS THAT THE JURY DETERMINE THE EXISTENCE OF PRIOR DUI CONVICTIONS IN A FELONY DUI TRIAL, THE BIFURCATED PROCEDURE OF STATE V. RODRIGUEZ, 575 SO. 2D 1262 (FLA. 1991) SHOULD BE AMENDED IN LIGHT OF UNITED STATES V. GAUDIN, 515 U.S. 506 (1995).

Before addressing the merits of the issue raised by the certified question, respondent first notes for the record his objection to the state's filing the Notice To Invoke Discretionary Jurisdiction on an issue which was raised by the respondent who is the aggrieved party in this cause. The Fourth District Court of Appeal ruled against the respondent on this question of law and, then certified the question. However, that same district has held on two occasions that the aggrieved party is the proper party to invoke the discretionary jurisdiction of this honorable court. Taggart Corporation v. Benzing, 434 So. 2d 964, 966 (Fla. 4th DCA 1983) ("The losing party at our level still has to exercise the initiative and go forward, otherwise the issue dies.); Div. of Pari-Mutuel Wagering v. Winfield, 443 So. 2d 455, 458 (Fla. 4th DCA 1984) [We conclude with a repetition of our warning in Taggart Corporation v. Benzing, 434 So. 2d 964 (Fla. 4th DCA 1983), that certified questions do not automatically go forward to the Supreme Court and there must be an exercise of affirmative initiative by the losing party."].

In addition, the state's "racing to the courthouse door" to file the Notice To Invoke Jurisdiction has resulted in prejudice to the respondent. The party upon whom the burden of persuasion rests is generally always entitled on appeal to rebuttal by having the opportunity to file a reply. Respondent is the real party who has the burden of persuasion in this case; nevertheless because of the state's action, the respondent has been deprived of rebuttal. Clearly, the state's conduct demonstrates at the very least a total lack of professional courtesy.

Moreover, the motive of the state in filing a Notice to Invoke Jurisdiction is questionable. If respondent chose not to pursue the issue further and declined to file a notice to invoke discretionary jurisdiction, then as stated by the District Court in Taggart, supra, the question dies and the state remains the prevailing party on that issue. Obviously, the state has filed the notice in an attempt to argue for the first time its point II which is totally unrelated to the certified question and not the basis upon which the state invoked the discretionary jurisdiction of this court. Respondent respectfully suggests that the state comes to this court with "unclean hands."

With respect to the merits of the certified question, the issue is simple. Under the bifurcated procedure in a felony DUI case established by this honorable court in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) the jury first decides the issue of the pending DUI; upon a finding of guilty by the jury, the judge then determines the issue of the prior DUI convictions. Respondent is

requesting that this procedure be amended to have the jury decide the element of the prior convictions rather than the judge upon a jury returning a verdict of guilty on the pending DUI charge. This honorable court in State v. Woodruff, 676 So. 2d 975, 976 (Fla. 1996) held that the existence of three (3) or more prior DUI convictions is an element of the crime of felony DUI. The Supreme Court of the United States in United States v. Gaudin, 515 U.S. 506, 132 L.Ed. 2d 444, 115 S.Ct. 2310 (1995) ruled that in a criminal case the Fifth and Sixth Amendments of the United States Constitution require that a jury determine that the defendant is guilty beyond a reasonable doubt of every element of the crime charged. The law as well as reason dictates that inasmuch as three (3) or more prior convictions are an element of felony DUI, under the bifurcated procedure established in the Rodriguez, supra, a jury should decide the element of the prior convictions upon first finding that defendant is guilty beyond a doubt of the pending DUI charge. Respondent respectfully requests that this honorable court answer the certified question in the affirmative and so amend the procedure established in the Rodriguez case.

The state's reliance upon Boyett v. State, 688 So. 2d 308 (Fla. 1996) in support of its argument that application should be prospective is totally misplaced. Boyett simply deals with an interpretation of the word "presence" with respect to a rule of criminal procedure, Fla. R. Crim. P. 3.180. In sharp contrast, the certified question involves an issue of constitutional dimension - the deprivation of respondent's rights guaranteed by the Fifth and

Sixth Amendment to the United States Constitution to a jury trial on all elements of the crime charged- and requires reversal of the conviction and remand for a new trial. United States v. Gaudin, supra, (reversing defendant's conviction and remanding for a new trial on the ground that the trial court, not the jury, decided an element of the crime charged). In short, the state's prospective application argument is meritless.

II.

THE STATE, HAVING INVOKED THE DISCRETIONARY JURISDICTION OF THIS COURT SOLELY ON THE BASIS OF THE CERTIFIED QUESTION IN POINT I, HAS WAIVED THE RIGHT TO ARGUE AND /OR IS PRECLUDED FROM ARGUING THE COMPLETELY UNRELATED ISSUE RAISED IN POINT II.

The state has opted to become the petitioner in this cause by filing the Notice To Invoke Discretionary Jurisdiction based soleLy upon the question certified by the Fourth District Court of Appeal. The certified question is totally unrelated to the argument raised by the state under this point. Having invoked the jurisdiction on the certified question, the state has waived any right to argue any other issue of law. Similarly, the order of this court dated May 21, 1998 regarding the filing of briefs on the merits is directed to the state's Notice To Invoke Discretionary Jurisdiction stating: "The Fourth District Court of Appeal certified a question of great public importance." Thus, the May 21, 1998 clearly could only have been directed to the merits of the certified question. The argument raised by the state in point II is, therefore, beyond the scope of this order.

The state is also precluded under the Rules of Appellate Procedure from arguing point II. Pursuant to Fla. R. App. 9.330 (a), a party may file a motion for certification within fifteen days of the court's opinion. The state failed to file a motion for certification with respect to point II or even a motion for rehearing. Moreover, except for the bare allegation with respect thereto, the state did not fully develop, brief or argue this issue before the District Court of Appeal. If the state desired to

properly present this point to this court, it should have fully argued the point in the District Court of Appeal and then filed a motion to certify under Fla. R. App. P. 9.330(a). Having failed to follow this procedure, the state is precluded by the appellate rules from arguing this issue for the first time before this honorable court. Respondent respectfully suggests that to permit the state to argue Point II and to give consideration to this argument would make a complete mockery of the Rules of Appellate Procedure.

While not waiving the above arguments, in response to the state's argument that the facts of this case are different from Bryant v. State, 656 So. 2d 426 (Fla. 1995) and Brown v. State, 538 So. 2d 833 (Fla. 1989), respondent would rely upon the thorough analysis of this argument and conclusion of the Fourth District Court of Appeal rejecting same in its opinion. (App 3-5)

The state's argument that this error should be subject to the harmless error analysis is equally without merit. The reason why a harmless error analysis is not appropriate can be found in the very holding of this court in Brown v. State, Id. where in an almost identical factual situation the prosecutor and defense counsel in the absence of the trial judge were alone with the jury in the jury room:

> ...., nor do we know that the prosecutor's demeanor and manner in dealing with the jury. The prosecutor's statements and conduct, indeed this whole procedure, might well have had a chilling effect on the jury's deliberations. No one can say at this point that the judge's absence did not have a detrimental effect on the jury's

> deliberations. The possibility of prejudice is so great in this situation that it cannot be tolerated. 538 So. 2d 836.

Respondent would also note that the decisions in the Brown and Bryant cases were rendered subsequent to the decision in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) relied upon by the state in support of its harmless error argument. Thus, this honorable court was well aware of its decision in DiGuilio when this court issued the opinions in Brown and Bryant, finding per se reversible error.

Respondent respectfully suggests that for all of the above reasons this honorable court reject the argument presented by the state under point II.

## CONCLUSION

Based upon the foregoing reasons and citations of authority, Respondent, ROBERT HARBAUGH, respectfully requests that this honorable court answer the certified question in the affirmative and amend the bifurcated procedure set out in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) whereby upon a finding of guilty of the pending DUI charge, the jury (as opposed to the trial court), then determines beyond a reasonable doubt the element ofthe existence of the three or more prior DUI convictions. Respondent further respectfully requests that this honorable court reject the argument raised by the state in point II of its brief.

Respectfully submitted,

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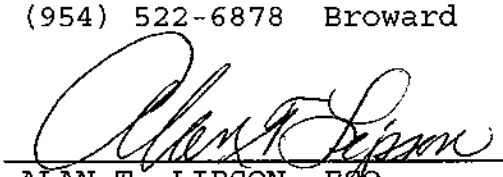
By: 

ALAN T. LIPSON, ESQ.
Fla. Bar. No. 151810

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS has been furnished by U.S. mail to Ettie Feistmann, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33401 this 9th day of July, 1998.

By: